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ABSTRACT

The speaker discusses the effect recent Supreme Court cases have had on teacher and administrator dismissals and contract nonrenewals. He notes two implications--that board members and administrators must become better informed of the rights of students, teachers, and staff members and that board policies must become more clearly defined and more clearly focused on procedures. (Author/IRT)

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WILL YOUR DUE PROCESS PROCEDURES KEEP YOU OUT OF COURT?

(The Do's and Don't's)

Prepared by Daniel J. Stoops
for Clinic A-6
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April 10, 1976
San Francisco, California

The U. S. Supreme Court once defined Due Process as "an Elusive Concept" -- the exact boundaries of which are undefinable and in which its content varied according to specific factual situations. [Hannah v. Larche, 363 U.S. 420 (1960)].

Whether the Court requires that a particular right obtain in a specific proceeding will depend upon a series of complex factors. The nature of the right, the proceeding, the possible burden on that proceeding are all factors to be taken into account.

It is therefore necessary to speak to some degree in generalities. Litigation in the field of education dealing with students, teachers, administrators and staff has expanded in recent years as rapidly as any other legal area. Courts have become involved in areas which were, ten to fifteen years ago, almost foreign to our thinking. Decisions in legal fields such as criminal, administrative and civil rights have all had a substantial influence on education law. Laws have been passed and

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decisions have been rendered which have and will continue to protect those engaged in public employment and particularly education. No one seriously argues that some protection is justified, however, the dispute arises over how much is justified.

How does "Due Process" affect you when dealing with teachers and administrative dismissals? There is no question that they are entitled to the elements of due process. While each case will vary on its individual circumstances, there are certainly factors which will remain constant.

There are two leading cases in this area: Board of Regents v. Roth, 408 U.S. 564, 43 L.Ed.2d 548, 92 S.Ct. 2701, and Perry v. Sindermann, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694. The Supreme Court expressed the view that procedural due process applies only to the deprivation of interests encompassed with the Fourteenth Amendment's protection of liberty and property, and the range of such interest is not infinite; and, that procedural due process protects only those interests a person has already acquired in specific benefits. When these protected interests become involved, the right to a hearing prior to dismissal is mandatory.

There is no question that an attempt to dismiss a teacher during the contract year requires a hearing. The teacher has an "interest" in the contract of employment, which type of interest is protected by the Constitution. This type of situation is not very difficult. All states to my knowledge have

some procedure which must be followed in dismissing a teacher while that teacher is under contract. The important thing, beyond the hearing, is that these procedures be meticulously followed. The Courts have been very consistent in requiring an exact compliance with the procedures required by your state law. Seldom is it possible for a person to waive a statutory requirement when it becomes involved with constitutional principles.

More difficult is the area of non-renewal of a contract. Again, you must follow your statutory procedures in a very exacting manner. If you do not have statutes dealing with tenured teachers or probationary teachers, you will need to look to your own Bylaws or Policy Manuals in this area.

The two cases which I mentioned both stand for the proposition that non-tenured teachers are not entitled to a hearing nor are they entitled to the reasons for non-renewal. This is, of course, in the absence of any statutory guidelines you may have in your individual states.

To have a protected property interest, the person must have some entitlement to the same. Mere expectation of receiving a new contract is not in and of itself sufficient. The Constitution does not by itself make property rights -- they must come from an independent source such as your own policies and rules, or your own state statutes. Obviously, each person

has a concern about being rehired, but this alone is not a sufficient property interest for constitutional protection.

However, if you give reasons for non-renewal you must be careful not to infringe upon the "liberty" guaranteed by the Fourteenth Amendment. If you give a reason which tends to seriously damage a person's name, reputation, integrity or standing in the community, then that person is entitled to a hearing to refute the charges. It has been held that simply declining to re-employ does not attach a stigma or other disability which forecloses the freedom to seek and take advantage of other employment opportunities.

Unless you are required to give a teacher reasons for non-renewal, I strongly suggest that you do not, for an attempt to do so can only lead to litigation over whether by so doing you have involved yourself in areas of property and liberty interests protected by the Constitution. If you are required, or if you do desire to give reasons, be careful of the language you select for use in the notice.

You should be careful that the language in your contracts, negotiated agreements, and faculty handbooks do not give rise to "expected property rights." If, for example, you have a clause indicating that a probationary teacher's contract will be renewed, except for "good cause," you have probably created the reasonable expectation that I mentioned and have given that teacher a property right that may not be taken away except by procedures meeting the requirements of due process.

How impartial is your Board when you do have a hearing? The requirement of an impartial Board is well established as an essential element of due process. This is, of course, one of the key questions being raised in the Hortonville case now waiting to be heard by the Supreme Court. Here the Board was directly involved with the teachers in negotiations regarding salary and other matters of mutual concern. Ultimately a strike occurred, notice of hearings were given to the teachers, and ultimately dismissal of those teachers involved. The trial court held that the Board was not an impartial body and the teachers were denied due process. Due process is not limited to a determination of whether an act was committed but extends to the action to be taken as well.

This obviously gives rise to procedural problems in all the due process areas. Your regulations should allow investigation of charges, and hearings in student and employee disciplinary matters in such a way that you may sit in a fair and impartial manner. This is difficult to do in many areas of your responsibility, and you must proceed with caution in trying to accomplish these aims.

This is especially true if you are dealing with dismissal of your superintendent. Certain members of the Board, or perhaps the entire Board, will be the ones who become dissatisfied with the performance of the superintendent and then make a determination that he should be dismissed. You may have a split Board with the

majority investigating and pressing the charges and then sitting in judgment. Obviously this falls short of fundamental fairness and the Courts have so held. Some states have procedures to avoid this whereby statutes establish independent panels or allow a petition to an appropriate Court. If you do not have such a procedure in your state, then your policies should be carefully examined and procedures established to avoid this type of charge.

I have touched only in general terms upon these important areas. The same general rules will apply, absent statutory requirements, to your other employees. Follow your regulations and do not give unnecessary grounds for expectation of continued employment or infringe upon a person's liberty by statements reflecting upon that person's reputation or integrity.

Will the implications of the Wood decision be applied to Board members in teacher dismissals? I see no reason why they will not. If members are accountable for knowing the Constitutional rights of students, I see little problem in extending that to due process procedures involving your staff. The test for your liability in the terms of damages would seem to be not so much in the procedures provided, but in the rights which are violated. The test set forth in Wood, if applied to the teacher area, leads into a rather high risk area, just as it does for student expulsion. It points the way for expensive litigation.

The recent decisions leave several implications which I think are very clear:

1. Board members and Administrators must become better informed of the Constitutional rights, not only of students, but of teachers and staff. In service training, seminars and advanced study are going to be required.
2. Board policies must become more defined and more clearly focused upon the procedures which you are going to use.

Teachers and staff are becoming more familiar with their legal rights and they are going to demand the same. No longer can you operate on the basis or theory that we can settle by a friendly discussion -- full and complete documentation of the reasons for discharge are a necessity. A large question remains both in student and teacher discipline: Can you be effective in the field of education and still have policies which are constitutionally sound? I think you can, but it is going to require a change in attitude for many, a change in policies, and a completely different approach. You are bound to know these Constitutional rights and required to apply them fairly. Ignorance is no defense for violation of a right the Court has stated is without dispute.

The same ramification of Wood, as applied to students, applies to teachers. You may not disregard a teacher's clearly established right, even in ignorance, and expect to have that act characterized as being in good faith.

As we all know, there are many urgent situations in the field of school law -- Courts, and particularly our federal courts,

have different opinions in the same area. These differences do not lead to a clear constitutional right that the Court has discussed.

With suits being filed under the Civil Rights Act and punitive damages being sought, many Boards are now finding they cannot contract for this type of insurance coverage. This, hopefully, is going to make you more conscious of the need to know what rights your teachers and students have and while a serious problem, it will be good to the extent you educate your Boards.

Due process is a reasonable concept to live with. The right to know the charge, a hearing, confronting witnesses, right to counsel and its other ramifications should not be difficult, nor should we adapt an attitude of defiance based upon a belief that it is judicial interference.

The schools are government and the Courts and legislature have always been involved to different degrees. While there is no right to government employment, once granted it may only be taken away in a manner consistent with Constitutional guarantees.

Boards should accept this for what it is -- an interpretation of the laws by which we all live -- on a case by case basis and, in generally the Courts do a commendable job.

We must be prepared to change our attitude of running the schools with an iron hand and be able to accept a yielding position when necessary. Boards must make decisions in this

area with an awareness of what is required by law.

Due process in the school field is not yet fully defined. It is not an extreme on either end of the spectrum, but probably in between.

We all have some concerns about where we are headed, but we must not lose sight of what we are seeking to accomplish -- education of youth, our most important national resource. Your actions and desires as a Board, balanced with your legal oligations to students and teachers alike can be accomplished. They can be made to work in an effective, practical manner and in a way that represents fairness and the best interest of all concerned.

Many believe that the political, social and judicial forces in our society today are wrong. We know that education and its leadership is a trememdous force. However, that force must be tempered with respect for what we have and what we need. It is a prerequisite, for when we believe that all means are permitted to accomplish our goals, then the goal becomes indistinguishable from the wrong we set out to correct.

Achieving justice is the ideal of humanity. It is not, however, the concern solely of the Courts, but must be the concern of each of us, as citizens, educators and Board members. We all have experiences and feelings which relate to these various problems. It is by these experiences that we can relate to others and by the same token they are the experiences upon which our nation's character has been and will continue to be developed.

Our destiny as a nation is not in the amount of learning or information we acquire, but it is in our character.

In closing, let me say that I know we are confronted with new problems, frustrations and uncharted courses. In that regard, I am reminded of a comment by Abe Lincoln:

> "As our case is new, so must we think and act anew."